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In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 1102

UNITED STATES OF AMERICA, APPELLANT,

v.

THE CONCENTRATED PHOSPHATE EXPORT ASSOCIATION, INC., ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the district court (App. 346-365) is reported at 273 F. Supp. 263.

JURISDICTION

The order of the district court was entered on September 11, 1967. The United States filed its notice of appeal on November 9, 1967. Probable jurisdiction was noted on April 1, 1968 (App. 367). The jurisdiction of this Court is conferred by Section 2 of the Expediting Act of February 11, 1903, 32 Stat. 823, as amended, 15 U.S.C. 29; *Brown Shoe Co. v. United States*, 370 U.S. 294; *United States v. E. I. du Pont de Nemours & Co.*, 366 U.S. 316.

QUESTION PRESENTED

Whether export trade associations engaged in selling goods procured under the government's foreign aid program are exempted from the antitrust laws by the Webb-Pomerene Act.

STATUTES INVOLVED

Section 1 of the Sherman Act, 15 U.S.C. 1, provides in pertinent part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal * * *.

Section 1 of the Webb-Pomerene Act, 40 Stat. 516, 15 U.S.C. 61, provides in pertinent part:

> The words "export trade" * * * mean solely trade or commerce in goods, wares, or merchandise exported, or in the course of being exported from the United States or any Territory thereof to any foreign nation; but the words "export trade" shall not be deemed to include the production, manufacture, or selling for consumption or for resale, within the United States or any Territory thereof, of such goods, wares, or merchandise, or any act in the course of such production, manufacture, or selling for consumption or for resale.
>
> The words "trade within the United States" wherever used in this Act mean trade or commerce among the several States or in any Territory of the United States, or in the District of Columbia, or between any such Territory and another; or between any such Territory or Ter-

ritories and any State or States or the District of Columbia, or between the District of Columbia and any State or States.

Section 2 of the Webb-Pomerene Act, 15 U.S.C. 62, provides:

> Nothing contained in [the Sherman Act] shall be construed as declaring to be illegal an association entered into for the sole purpose of engaging in export trade and actually engaged solely in such export trade, or an agreement made or act done in the course of export trade by such association, provided such association, agreement, or act is not in restraint of trade within the United States, and is not in restraint of the export trade of any domestic competitor of such association: *And provided further*, that such association does not, either in the United States or elsewhere, enter into any agreement, understanding, or conspiracy, or do any act which artificially or intentionally enhances or depresses prices within the United States of commodities of the class exported by such association or which substantially lessens competition within the United States or otherwise restrains trade therein.

STATEMENT

This is an appeal by the United States from the district court's dismissal of its civil antitrust suit arising out of shipments of fertilizer to the Republic of Korea under the United States' foreign aid program by a group of companies acting in concert through an export association.

308-915—68——2

I. THE FOREIGN AID PROGRAM

Since World War II, the United States has furnished economic assistance to other countries. Initially this program was aimed at aiding the war-torn nations of the world; in more recent years it has been directed toward "aiding peoples of less developed friendly countries of the world to develop their resources and improve their living standards." § 102, Foreign Assistance Act of 1961, 75 Stat. 424, as amended, 22 U.S.C. 2151.[1]

Foreign assistance consists of a number of distinct programs, each governed by its statutory requirements. The present case involves grants for technical cooperation and development, which are financed by funds appropriated annually by Congress on the basis of budget requests and recommendations by the Department of State and the Agency for International Development (AID).[2] See, *e.g.*, 81 Stat. 936; 80 Stat. 1018; 78 Stat. 1015.

AID makes funds available to recipient nations in the form of loans or grants, depending on the type of program, its statutory authorization, AID regulations

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[1] See, *e.g.*, the Foreign Aid Act of 1947, 61 Stat. 934; the Foreign Assistance Act of 1948, 62 Stat. 137; the Foreign Economic Assistance Act of 1950, 64 Stat. 198; and the Mutual Security Act of 1954, 68 Stat. 832, which remained in force until passage of the present law, Foreign Assistance Act of 1961, 75 Stat. 424, as amended, 22 U.S.C. 2151.

[2] AID, a semi-autonomous agency within the Department of State (22 U.S.C. 2396(a)), was established by the Secretary of State on September 30, 1961, as successor to the International Cooperation Administration which had administered foreign assistance under the Mutual Security Act of 1954 (Exec. Order No. 10610, 20 F.R. 3179).

and the terms of bilateral agreements between the United States and the recipient nations. The United States reserves comprehensive control over use of the funds through statute (22 U.S.C. 2161–2213), regulation (AID Regulation No. 1, 22 C.F.R. Part 201, App. 173–188) and the terms of the bilateral agreements (see App. 47, 110–112).

Since December 1953 the United States has had bilateral agreements with the Republic of Korea for economic, technical and related assistance (App. 46–47, 90–97). This case involves assistance grants to Korea under the agreement dated February 8, 1961 (App. 46–47, 77–89).

2. THE DEFENDANTS

In 1961, the Concentrated Phosphate Export Association ("the Association"), composed of firms engaged in the domestic production of concentrated phosphatic materials, was organized as a non-profit corporation, for the purpose of enabling its members to act as a group in the overseas sale of phosphate used in the production of fertilizer.* It registered with the Federal Trade Commission as an "association which engages solely in export trade" under Sec-

*In 1961, the Association's membership consisted of W. R. Grace & Company, Tennessee Corporation, and American Cyanamid Company. Two other corporations, which were members at the time this case originally went to trial, later withdrew from the Association. International Minerals & Chemical Corporation terminated its membership on June 30, 1966. Socony Mobil Company, Inc., now known as Mobil Oil Company, withdrew from membership effective March 15, 1967. Appellees advise that the Association was dissolved on December 28, 1967 (Appellees' Motion to Affirm or Dismiss, pp. 5, 20).

tion 5 of the Webb-Pomerene Act (40 Stat. 517, 15 U.S.C. 65). Under its by-laws, the Association was controlled by a Board of Directors, each director representing a member firm (App. 45; Ex. 4, p. 62). The Board determined the price at which its members would sell concentrated phosphate to the Association and the minimum price at which these materials would be sold by the Association abroad. It also allocated available business among its members under procedures set forth in the membership agreements (App. 45; Ex. 2, pp. 46-46-A; App. 71-74).

3. THE TRANSACTIONS INVOLVED

Between September 1961 and April 1966, the Association furnished more than 800,000 tons of concentrated phosphate to the Korean Government (see App. 327-340), for which it received $48.1 million, or approximately 52.5 percent of its total sales of $83.4 million for this period (see App. 54). Eleven of these transactions, the subject of the instant suit, were arranged and financed by AID under the Foreign Aid Program (App. 50). The Association's AID-financed deliveries to Korea totaled $43.7 million (App. 54). On none of these transactions could the Association members bid individually—the Association was their exclusive outlet for overseas deliveries (App. 70-71). In each instance a single bid was agreed upon by all

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"Ex." refers to stipulated exhibits included in the record in the district court, on file in this Court, but not printed in the Appendix.

The other two shipments, valued at $4.3 million, were financed with the Korean foreign exchange funds and a special stabilization fund unrelated to the Foreign Aid Program (App. 50-51).

members and submitted in their behalf by the Association.

Two basic methods of procurement are used by AID in furnishing goods to foreign governments: (1) procurement through a U.S. government agency; and (2) procurement through an agency of the recipient nation. Both methods were used in the transactions involved here. In two of the procurements a United States government agency, the General Services Administration (GSA), acquired the phosphates in the name of the United States and thereafter transferred them to Korea. In nine others the invitations to bid were issued by an agency of the Korean government, under procedures specified and controlled by AID.

The GSA procurements were conducted as follows. After the Korean government had requested AID to authorize procurement of the phosphates (App. 293), AID designated GSA as the procurement agency (App. 296). GSA issued an invitation to bid on a standard government form (App. 303) which informed prospective bidders of the identity of the recipient country and of any limitations on the geographic source from which the material might be supplied. After bids were received and reviewed by GSA personnel, the agency decided which bid was "most advantageous to the Government, price and other factors considered" (App. 304). The bid was accepted in the name of the United States (see Ex. 36, p. 350); and the phosphates were delivered to the United States, which then shipped them to Korea. The Association's invoices for payment were submitted directly to GSA (Ex. 38, p. 369), which paid both the total price plus the freight costs out of funds allocated by

AID at the time it issued the procurement authorization (App. 48–49). The GSA procurements from the Association in this case totaled approximately $8 million (App. 334).

The nine other procurements, whose total cost was approximately $35.7 million (App. 54), were effected through the Office of Supply, Republic of Korea (OSROK) which had been authorized by AID to arrange procurements to be paid for by the United States. AID issued a procurement authorization to OSROK which permitted it to issue invitations for bids on specified amounts of phosphates under AID's program. Each phase of the transaction was subject to strict regulation and control by AID (*e.g.*, App. 189–210; Ex. 14–16, pp. 211–221); indeed, OSROK's invitation for bids incorporated AID Regulation No. 1 (see App. 211) which governs all AID-financed procurement. Under AID's procurement authorization, a United States bank to which had been issued an AID letter of commitment was designated to make payment to the successful bidder against the appropriate shipping documents. OSROK invited bids, prepared an abstract of bids received (Ex. 19, pp. 245–250) and awarded the contracts on the basis of the lowest F.O.B. costs (App. 213). It reported all of this information to AID (Ex. 20–23, pp. 252–262). The successful bidder then arranged for the delivery of the phosphates at the designated Korean port and received payment from the United States bank designated by the AID letter of commitment. The bank was then reimbursed by the Treasury out of funds appropriated to AID (App. 265–281).

Under either method of procurement, the United

States paid the entire cost of the phosphates furnished to Korea.* AID's approval and issuance of a procurement authorization were necessary to initiate the process in each case and, regardless of the method of procurement, AID determined every significant detail of the entire transaction. AID Regulation No. 1, 22 C.F.R. Part 201 (App. Ex. 10).

4. THE AID PROCUREMENT REGULATION

AID Regulation No. 1 (22 C.F.R. Part 201) (App. 173–188), which became effective November 1, 1964, as a successor to a similar regulation issued by its predecessor agency, ICA (App. 141–172), comprehensively sets forth the conditions and procedures applicable to AID-financed procurement. Before authorizing procurement of a commodity requested by a foreign government, AID is required to determine whether the proposed purchase is in accordance with the objectives of the Foreign Assistance Act (App. 48, 111). AID specifies the commodity and the maximum amount of money which is to be provided, delivery periods, the source of supply, and any other conditions it deems necessary (22 C.F.R. 201.11) (App. 175).

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* When the concentrated phosphate procured with AID funds is resold by the Korean Government to private purchasers within Korea, the funds generated thereby are deposited in the Bank of Korea and are subject to a "counterpart fund" arrangement (App. 49, 353). Under this arrangement, these funds are available to both the United States and Korea, to be used for mutually agreed purposes such as supporting American and Korean defense establishments, Korean public works programs, etc. (*Ibid.*). However, Korea is under no obligation to repay the AID funds (App. 49, 353, cf. 358).

Re-export of the commodity by the foreign country is prohibited unless specifically authorized by AID, and failure to comply with this requirement obligates the recipient country to refund the amount paid by AID (22 C.F.R. 201.42) (App. 179). Similarly, AID may require a refund from the recipient country whenever the transaction violates the requirements of AID's regulations or any United States statute (22 C.F.R. 201.81) (App. 186).

AID determines the maximum price range (22 C.F.R. 201.60-201.69) (App. 182-185), and also requires that commodities be purchased at prices not in excess of the market price prevailing in the United States, as adjusted for differences in cost, transportation, destination, quality and terms of payment (22 C.F.R. 201.60, 201.63) (App. 182, 183). AID may authorize the procurement of the commodity to be made by a United States government agency, *e.g.*, the General Services Administration (22 C.F.R. 201.86) (App. 186). Finally, it may divert the shipment at any time before delivery and require that the title to AID-financed commodities in transit vest in AID "if in the opinion of A.I.D. such action is necessary to assure compliance with the provisions or purposes of any act of Congress" (22 C.F.R. 201.44) (App. 179).

Before payment is made, each supplier must file with AID a Supplier's Certificate (22 C.F.R. 201.52 (a)(6)) (App. 182), by which he affirmatively warrants compliance with the series of regulations pertaining to price and manner of bidding and agrees to make the appropriate refund to AID upon demand,

in the event of non-performance under his contract, for any breach of the certificate or for any false certification.

5. THE DECISION OF THE DISTRICT COURT

On December 21, 1964, the United States filed a complaint against the Association and its member firms charging that their activities in selling concentrated phosphate to Korea under the AID program constituted illegal price fixing and allocation of business, in violation of Section 1 of the Sherman Act. The government sought (a) an injunction against further concerted activity by the defendant firms in connection with foreign aid and all other transactions; (b) dissolution of the Association; and (c) a prohibition against its members' reestablishing the Association for ten years thereafter. During the proceedings the government abandoned its request for dissolution.

The case was submitted to the district court on the stipulated facts summarized above. On September 11, 1967, the court dismissed the complaint, holding that the Association's acts in connection with the Korean transactions were exempted from the antitrust laws by the Webb-Pomerene Act. The court agreed with the government that the United States, through AID, "initiated, directed, controlled and financed" the transactions (App. 358), but it concluded that the sales, whether handled through an agency of the Korean Government or through GSA, were actually made to the Korean Government as purchaser. It based this conclusion on the fact that the commodity

was specifically procured for shipment to Korea; on the "raison d'être" of the foreign aid program; on the counterpart fund arrangement with Korea; and on the fact that after shipment, the risk of loss is on Korea (App. 358–359). Since the sales were not for domestic resale or consumption, and were made to a foreign purchaser, the court determined that they constituted "export trade" within the literal meaning of the Webb-Pomerene Act (App. 359).

The district court rejected the government's argument that the Webb-Pomerene Act, as an exception to the antitrust laws, should be construed narrowly to apply only to the kind of transactions specifically contemplated by Congress, particularly where its application would result in disadvantage to the United States through concerted activities. It conceded the unfairness of depriving the government, which pays for the shipments, and ultimately the American taxpayer, of the benefits of competitive bidding, but it found that there was no ambiguity in the statute's definition of "export trade." It noted that Congress had carefully limited the provisions of the Webb-Pomerene Act so as to prevent any injury to domestic competition and any effect on domestic prices, but pointed out that no such injury or effect was charged in the instant case (App. 362–363).[1] As to the govern-

[1] See n. 6, *supra*, p. 9.

[2] The government did not allege that the Association's activities were "in restraint of the export trade of any domestic competitor of such association" or that its conduct "artificially or intentionally enhances or depresses prices within the United States of commodities of the class exported by such association * * *" (15 U.S.C. 62).

ment's claim that bidding by Webb-Pomerene associations burdens and frustrates the foreign aid program, the court held that the Association's activity was fully known to AID when it accepted the bids, and that AID has adequate regulatory power to protect its procurement activities from unreasonable prices (App. 364-365).

INTRODUCTION AND SUMMARY OF ARGUMENT

In holding that foreign aid selling practices by an export trade association made up of companies which otherwise compete are exempt from the antitrust laws under the Webb-Pomerene Act, the district court reached a result that in its own words "seems obviously unfair to the United States * * *" (App. 362). For it has construed the Webb-Pomerene Act's limited exception to the antitrust laws so as, again in its own words, "to permit the defendants to charge an artificially set price and deprive the Government of price benefits which might come from competitive trade conditions within the United States" (*ibid.*).

Such a result disregards the narrow purposes of the Webb-Pomerene Act as disclosed by its legislative history—to enable American exporters to cope with cartelized foreign competition in foreign markets without causing any adverse effects on the economy of the United States. Within this narrow frame the Act operates in derogation of the Sherman Act's clear prohibition against concerted price fixing. Under familiar principles of construction designed to preserve the national policy in favor of competition, therefore, the Webb-Pomerene Act must be closely confined within the scope

of its intended purpose. That purpose does not embrace the comprehensive foreign aid program which the United States maintains in today's uncertain international economy. To deprive the United States of the benefits of competition on foreign aid procurement which it "initiate[s], direct[s], control[s] and finance[s]" (App. 358), on the grounds that the transactions are "export trade" and that the recipient nation is the "purchaser", is to covert an antitrust exemption designed for other purposes into an unjustified burden on limited foreign aid funds. Moreover, the district court's reading of the statute is inconsistent with the long-established congressional policy favoring competition in government procurement. Finally, the impact of the antitrust laws here cannot be avoided by assuming, as did the court below, that AID's discretionary powers over procurement matters are a substitute for the role of the antitrust laws in guaranteeing competitive pricing in the foreign aid program. Whatever its procurement powers, AID has not been designated by Congress to enforce the antitrust laws: that is a matter for the Department of Justice, the Federal Trade Commission and the courts.

ARGUMENT

I. THE HISTORY, LANGUAGE AND PURPOSE OF THE WEBB-POMERENE ACT SHOW THAT IT DOES NOT EXEMPT FROM THE ANTITRUST LAWS FOREIGN AID PROCUREMENT INITIATED, CONTROLLED AND FINANCED BY THE UNITED STATES

The general language of the operative provision of the Webb-Pomerene Act, conferring immunity from the Sherman Act for acts done by an association "in the course of export trade," itself throws little light on the

problem before the Court—whether this immunity extends to goods sold to the United States for export under the foreign aid program. When this language is viewed, however, in the light of (1) the Congressional purpose in providing the immunity, (2) the other provisions and general design of the Act, and (3) the long established Congressional policy favoring competition in government procurement, we submit that the Webb-Pomerene antitrust immunity for "export trade" does not cover foreign aid transactions.

A. The legislative history of the Webb-Pomerene Act demonstrates the narrow Congressional purpose in creating the Act's limited exception to the antitrust laws. The statute, which is a complete departure from the general principles of the antitrust laws, was passed to enable American companies to compete effectively in international markets against foreign combines, and to offset the collective power of the foreign purchasing cartels prevalent when World War I began.

The initial impetus for the legislation came from a 1916 report of the Federal Trade Commission on cooperation in American export trade (see 55 Cong. Rec. 3576–3577). That report pointed to competitive disadvantages suffered by American exporters because our antitrust laws were thought to prevent them from undertaking joint selling arrangements in foreign markets. But the Commission's report emphasized that "[t]o allow American firms to cooperate for export and to permit the use of certain methods abroad which are legal in foreign countries but are not permitted in the United States in no way implies that such cooperating firms will be allowed, through their activities in export trade, to bring about results in

this country which could not otherwise be legally secured."[9]

This view was reiterated by the legislation's sponsors (*e.g.*, 55 Cong. Rec. 3580, remarks of Congressman Webb; 56 Cong. Rec. 170, 172, remarks of Senator Pomerene) during the debates on the proposal in the 64th and 65th Congresses,[10] and in the

[9] Report of the Federal Trade Commission on Cooperation in American Export Trade, p. 876 (1916). See H. Doc. No. 1485, 64th Cong., 2d Sess. pp. 19–22, 34–36.

[10] Following the Federal Trade Commission's report in 1916, bills to implement its recommendations were introduced in Congress. H.R. 16707, 64th Cong., 1st Sess.; S. 6865, 64th Cong., 1st Sess.; H.R. 17350, 64th Cong., 1st and 2d Sess. After hearings (Hearings before the House Committee on the Judiciary on H.R. 17350, 64th Cong., 1st Sess.), H.R. 17350 was favorably reported in the House without amendment (H. Rep. No. 1118, 64th Cong., 1st Sess.). The debates in the House (53 Cong. Rec. 13532–13540, 13676–13732) were principally concerned with the necessity of protecting small American exporters from the concerted buying and selling power of foreign cartels. The expressed object of the bill was the promotion of export trade, and this view prevailed over the objections of those who feared the bill would effect a repeal of a significant portion of the Sherman Act. The bill, as amended, passed the House on September 2, 1916 (53 Cong. Rec. 13732).

After further hearings in the Senate (Hearings before the Senate Committee on Interstate Commerce on H.R. 17350, 64th Cong., 2d Sess.), the bill was favorably reported with amendments (S. Rep. No. 1058, 64th Cong., 2d Sess.), but was not acted upon in that chamber.

The bill passed by the House was reintroduced in the next Congress as H.R. 2316, 65th Cong., 1st Sess. After it was amended in committee (H. Rep. No. 50, 65th Cong., 1st Sess.), it was debated on the House floor (55 Cong. Rec. 3563–3584) and passed by the House (55 Cong. Rec. 3584–3585). It was then reported to the Senate with further amendments (S. Rep. No. 109, 65th Cong., 1st Sess.), debated (55 Cong. Rec. 7324–7328, 7515; 56 Cong. Rec. 68–75, 107–112, 116–127, 168–186) and passed by that chamber (56 Cong. Rec. 186). In confer-

Committee reports.[11] The primary theme in the Congressional debates was that export trade was a matter of competition between nations, and that Congress wished to put American exporters in a position to capture as much trade as possible for the United States but without in any way burdening the people or the economy of this country. Thus, the sponsor of the bill in the House stated that he was "willing that there should be a combination between anybody or anything for the purpose of capturing the trade of the world, if they do not punish the people of the United States in doing it." 55 Cong. Rec. 3580. See, also, 55 Cong. Rec. 3701. This raison d'être of the Webb-Pomerene Act has no applicability to transactions which are paid for by the United States and thus cannot result in a net transfer of wealth to this country.

In the 65th Congress the proposed legislation was

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ence, further provisions were added to ensure that the activities of these associations would not lessen competition in domestic trade (see H. Conf. Rep. No. 468, 65th Cong., 2d Sess.). Both houses accepted the conference bill (56 Cong. Rec. 4698 (Senate), 56 Cong. Rec. 4722 (House)), and it was approved on April 10, 1918 (56 Cong. Rec. 4999).

[11] S. Rep. No. 109, 65th Cong., 1st Sess., p. 2, adopting S. Rep. No. 1056, 64th Cong., 2d Sess., stated: "[W]hile the purpose of these [export trade] associations is to improve and extend our foreign trade, their business ought to be so conducted as to harmonize with the requirements of our laws respecting domestic trade and without injuring any domestic competitor in the foreign trade or unduly thereby enhancing prices to domestic consumers." Similarly, H. Rep. No. 50, 65th Cong., 1st Sess., p. 3, adopting H. Rep. No. 1118, 64th Cong., 1st Sess., stated: "The bill does not authorize any violation of the present antitrust laws. * * * [It] prohibits the slightest violation of our antitrust laws within the United States, but makes it clear that American exporters doing business in foreign countries are to be allowed to do business in those foreign countries according to the foreign laws."

criticised principally on three grounds: (1) that it was contrary to the spirit of the Sherman Act; (2) that it could hamper efforts to prevent restraints on domestic markets; and (3) that it might result in monopolization of export trade (*e.g.*, 56 Cong. Rec. 175, 4723). Opponents were expressly assured, however, that the bill did not repeal the antitrust laws but merely modified them in a carefully restricted way (56 Con. Rec. 172, 173). The sponsors also repeatedly emphasized that the bill contained ample safeguards to protect the domestic economy and that its ultimate effect would be to promote American trade abroad and provide a powerful boost to the postwar economy. Indeed, further provisions were added in conference to assure this result (see n. 10, pp. 16–17 *supra*, H. Conf. Rep. No. 468, 65th Cong., 2d Sess.

It is true that reference was made during the congressional debates to the existence of extensive loans which the American government was making to certain foreign countries because of the impact of World War I on the economies of those nations, and to the probability that the purchasing power represented by these loans might be reduced somewhat by the proposed statute (see 55 Cong. Rec. 2789, remarks of Congressmen Kenyon and McCumber). But those were loans for which repayment from the various foreign governments was expected, not grants of the kind which have characterized the modern-day foreign aid program and which are involved in the instant case. It was the foreign countries that bore the burden, not the United States.

There is no indication in the legislative history that

American taxpayers would in effect be required to subsidize the anticompetitive conduct that the Act would authorize. What Congress foresaw was that when World War I ended the commercial struggle for foreign sales which had been carried on through private trade channels would be resumed. Its essential purpose was to strengthen the hand of American exporters in that struggle (see 56 Cong. Rec. 108, remarks of Senator Kellogg), but only so long as and to the extent that no adverse effects on the American economy resulted. Congress thus cannot properly be regarded as having envisaged and sanctioned transactions such as are involved here under the modern foreign aid program, carried out at the ultimate expense of the American taxpayer.

B. The Webb-Pomerene Act is an exception to the antitrust laws and it is a familiar principle that such exceptions are narrowly construed, even where a literal reading of the statute might lead to a broader exemption. See, *e.g.*, *California* v. *Federal Power Commission*, 369 U.S. 482, 485; *Milk Producers Association* v. *United States*, 362 U.S. 458, 469-470; *Silver* v. *New York Stock Exchange*, 373 U.S. 341, 357; *United States* v. *Borden Co.*, 308 U.S. 188, 198-202; cf. *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 335-349. Accordingly, the language of the statute must be confined to its specific underlying purpose. That purpose did not include transactions in which the economic impact of the anticompetitive activity authorized was borne by the economy of the United States.

Indeed, the consistent pattern of Congressional policy with respect to federal procurement, both before and after the enactment of Webb-Pomerene, has been to maximize the extent to which the government will bene-

fit from the normal play of competitive forces in making its expenditures. Competitive bidding was the favored method of procurement during the Civil War under the requirements of the Act of March 2, 1861, 12 Stat. 220. This requirement was continued in the Revised Statutes (R.S. 3709), which provision was in effect when Webb-Pomerene was enacted and remains in effect as amended (41 U.S.C. 5). When "immediate delivery" was "required by the public exigency," R.S. 3709 permittted procurement "by open purchase or contract, at the places and in the manner in which such articles are usually bought and sold * * * between individuals." But even this exception to the requirement of competitive bidding suggests that Congress contemplated that federal expenditures would be made in the context of the normal play of competitive forces in the market place.

Competitive bidding remains today the favored method of federal procurement specified in both the Federal Property and Administrative Services Act (41 U.S.C. 252(c)) and the Armed Services Procurement Act (10 U.S.C. 2304(a)). Under the terms of the latter, "proposals shall be solicited from the maximum number of qualified sources" even when the procurement is by negotiation (10 U.S.C. 2304(g)). As this Court has recognized, in general "the federal procurement policy demands competition * * *" *Paul* v. *United States*, 371 U.S. 245, 253. See, also, Comp. Gen. Dec. B 159868, November 7, 1967, 47 Comp. Gen. 223.

Against this background, the courts should be reluctant to conclude that the Webb-Pomerene Act departs from the pervasive Congressional policy of assuring that the public treasury will be afforded the benefits of

competition. Since Congress was not focusing upon government expenditure policies when it enacted Webb-Pomerene,[11] it is especially fitting to inquire whether the language of the statute is not susceptible of a construction which would harmonize it with the expenditure policies that Congress has elsewhere adopted—and particularly since exceptions to the antitrust laws are construed narrowly.

The district court, however, refused to look beyond the face of the Webb-Pomerene Act's definition of "export trade" in deciding that the Act's exemption from the antitrust laws extends to the foreign aid program.

The only definition of the term "export trade" in the statute appears in Section 1. That Section states that "export trade" means "solely trade or commerce in goods, wares, or merchandise exported, or in the course of being exported from the United States * * * to any foreign nation * * *" (15 U.S.C. 61). The district court adopted an expansive construction of the term, which creates an unqualified exemption from the antitrust laws for the appellees' concerted activities. In its view "export trade" means simply "to export", *i.e.*, "to carry or send abroad, especially to foreign countries" (App. 360), apparently without regard to the circumstances of the transaction or the legislative context of the term.

This is not, however, a necessary construction. Rather, the statute's emphasis on the phrase "trade or

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[11] When Congress has wished to favor American sellers in the context of government procurement, it has done so directly without creating any immunity from the antitrust laws and thus without depriving the government of the benefits of domestic competition. See the "Buy American Act", 41 U.S.C. 10a–10c, which requires procurement from American sellers under specified circumstances not applicable here.

commerce" would appear to indicate that Congress intended to refer only to export in the ordinary course of commerce, an interpretation which would not embrace foreign assistance by the government. This narrow reading of the antitrust exemption is appropriate against the background of legislative procurement policy favoring competition.

Even if it is assumed that "export trade", on its face, appears to include foreign aid transactions, it is a "familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers." *Holy Trinity Church* v. *United States*, 143 U.S. 457, 459. "[E]ven when the plain meaning did not produce absurd results but merely an unreasonable one 'plainly at variance with the policy of the legislation as a whole' this Court has followed that purpose, rather than the literal words. When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on 'superficial examination.'" *United States* v. *American Trucking Ass'ns.*, 310 U.S. 534, 543–544. See also, *Cabell* v. *Markham*, 148 F. 2d 737, 739 (C.A. 2), affirmed, 326 U.S. 404. Indeed, one of the sponsors of the exemption involved here, Senator Pomerene, stated on the floor of the Senate that he expected his bill to be analyzed as a whole by the courts (56 Cong. Rec. 172). When this is done, the narrow scope of the exemption Congress created becomes clear; it is confined to concerted activity whose effect is exclusively in foreign markets and upon goods sold abroad, not

to transactions where the basis sale is in the United States, and, in sum and substance, to the United States.

The language of the statute confirms this view. Congress wrote into the Webb-Pomerene Act strict limitations to ensure that the associations created would not restrain domestic trade. Thus, Section 1, which provides that "[t]he words 'export trade' . . . mean solely trade or commerce in goods . . . exported, or in the course of being exported from the United States . . . to any foreign nation . . . ," is qualified by a negative proviso excluding sales for domestic resale or consumption. Section 2 further limits the antitrust exemption: "Nothing contained in [the Sherman Act] shall be construed as declaring to be illegal an association entered into for the sole purpose of engaging in export trade . . . or an agreement made or act done in the course of export trade by such association, provided such association, agreement, or act is not in restraint of trade within the United States . . . ." That section further leaves without the scope of the exemption, and thus within the ambit of the antitrust laws, any agreement, understanding, conspiracy or act which artificially enhances or depresses prices within the United States, "or which substantially lessens competition within the United States or otherwise restrains trade therein." In short, "the wording of the statute," which the court below found conclusive (App. 349, 360-361), confirms that Congress intended to accomplish only a narrowly confined objective. Its purpose was to exempt from the antitrust laws only those concerted activities in foreign

trade which would not deny the benefits of competition to the domestic economy.

In sum, the policy reflected by the statutory language, by the Federal Trade Commission's report, by the committee reports, by the congressional debates and by the statutory background indicates that the legislation was narrowly directed to a limited class of transactions which would not directly affect the American economy in an adverse way. Since, as the court below recognized (App. 355–358), the full cost and responsibility for foreign aid procurement is assumed by the United States government, the concerted price-fixing and business allocation practices of the appellee companies through the Association have denied the government and its taxpayers the benefits of competition for the goods procured."

C. The limited Webb-Pomerene exemption cannot properly be extended to the foreign aid program by simply holding, as did the court below, that under that program the "purchaser" is the recipient nation, not the United States. The application of the antitrust laws is determined not by the form of the transactions involved but by their economic consequences. Concepts of private contract law must give way before federal antitrust policy. *Simpson* v. *Union Oil Co.*, 377 U.S. 13, 18; *United States* v. *Masonite Corp.*, 316 U.S. 265, 276–277. Moreover, the district court's holding that Korea is the "purchaser" of the eleven phosphate shipments in-

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[11] Not only are these practices inconsistent with the limited purpose of the Webb-Pomerene Act, they also are in conflict with the express policy of the foreign assistance program to encourage the efforts of other countries to promote competition and discourage monopoly (22 U.S.C. 2351(a)).

volved here is erroneous under both the stipulated facts and the court's own findings. As a matter of legal form as well as substance, the United States was the purchaser in the two transactions arranged through GSA; and as a matter of legal and commercial substance, under the anti-trust laws it should be treated as the actual purchaser in the others as well.

Indeed, the court found that "AID was at the center of the transaction: it was the force which initiated, directed, controlled and financed them. Without AID, there would have been no sale or purchase and the extent of the role it played was known in every detail to and relied on by both parties to the transaction, particularly by the supplier who looked to [AID] for payment and obligated itself to conform to its requirements and conditions if he was to receive payment." (App. 358.) It recognized that at any time prior to actual delivery the *government, through AID*, could divert the shipment or cancel it. If the regulations governing the procurement were violated, American, rather than Korean, law would define the remedy; and if a false claim for payment were made, the United States, and not Korea, would have the remedy. See Statement, *supra*, p. 10.

The fact that the commodity was procured for shipment to and use in Korea, rather than for domestic consumption or resale, does not dimish the need to protect the United States under the antitrust laws. Procurement for the benefit of foreign countries is the essence of the foreign aid program. In transactions of this kind the buying power of the United States is substituted for the recipient country's lack

of it; and the United States, which is paying the bill,[14] also controls the transaction from beginning to end. If anything, the raison d'être of the foreign aid program, on which the court below relied (App. 358), demonstrates that, in the context of this kind of transaction, it is the United States which, for antitrust purposes, should be treated as the "purchaser" of goods procured and shipped abroad through its efforts and at its expense.[15]

II. AID'S AUTHORITY TO PROHIBIT BY REGULATION CONCERTED PRICING ACTIVITIES BY SUPPLIERS OF COMMODITIES PURCHASED WITH FOREIGN AID FUNDS DOES NOT SUPPLANT THE ANTITRUST LAWS.

While the district court recognized the unfairness of imposing the burden of non-competitive purchasing on the American economy, it found this consideration

[14] Under the AID program there is no net transfer of wealth to this country in payment for the "export trade," whatever may be the program's benefits to American foreign policy (see App. 361). The intangibles of foreign policy gains and losses are not the objective at which the Webb-Pomerene exemption was aimed and do not warrant suspension of the antitrust laws under that Act's limited terms.

[15] Other factors on which the district court relied in finding the Webb-Pomerene exemption applicable (App. 358-359) are no more convincing. As to the counterpart fund arrangement (see note 6, p. 9, *supra*), the funds are restricted to use in Korea and may be used by that country as well as by the United States. This is plainly not the equivalent of repayment. Indeed, it was stipulated that the recipient country is under no obligation to repay the United States (App. 49). Thus, the transactions cannot be legally characterized as a loan of funds and technical service to Korea. The fact that the risk of loss is on Korea after shipment is merely a convenient assignment of responsibility under the terms of the grant. The United States retains full control over the shipment until it is actually delivered (22 C.F.R. 201.44, App. 179).

unpersuasive. Although such concerted activities are likely to increase the cost of foreign aid to the United States and thus limit the effectiveness of appropriations for this purpose, the court held that this was not a matter of antitrust concern. In its view, AID knew it was dealing with a Webb-Pomerene association and had regulatory authority to protect itself and the United States generally by requiring reasonable and competitive prices.[16]

This view misconceives the purpose and scope of the antitrust laws. However sweeping AID's discretionary powers over procurement may be, they plainly do not supplant the application of the antitrust laws to competition for AID-financed procurement. Nor can the agency's powers over procurement oust the primary responsibility of the Attorney General to prosecute and of the courts to remedy violations of the antitrust laws. In those laws Congress has condemned collusive activity and made competition our basic national policy. Only in narrow and specific exceptions involving pervasive and comprehensive schemes of industry regulation has its substituted administrative authority for this primary enforcement responsi-

[16] While the present case was pending in the district court, AID amended its regulations to prohibit Webb-Pomerene bidding on "U.S.-source only" procurements after January 1, 1967 (22 C.F.R. 201.52(a)(7), (1967 Rev.)). This does not obviate the need for relief in the present case, however, because none of the transactions involved here was restricted to "U.S.-source only" and there is no reason to assume that future procurements will be. Indeed, the regulation is always subject to revision by AID, and might be challenged in a separate judicial proceeding relying at least in part on the holding of the district court.

bility,[17] and it has never lodged it in procurement officers.[18] The antitrust laws protect all government procurement from noncompetitive bidding. Procurement officials cannot, by their action or inaction, waive or suspend the Sherman Act. Cf. *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 227.

CONCLUSION

The judgment of the district court dismissing the complaint should be reversed. Since the stipulated facts show that, unless sanctioned by the Webb-Pomerene Act, the appellees' conduct violated Section 1 of the Sherman Act, the case should be remanded for the entry of appropriate relief against those violations.[19]

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[17] For example, in Interstate Commerce Act, § 5(11), 49 U.S.C. 5(11); Federal Aviation Act, § 444, 49 U.S.C. 1384; Shipping Act of 1916, § 15, 46 U.S.C. 814. See *California* v. *Federal Power Commission*, 369 U.S. 482, 490; *United States* v. *R.C.A.*, 358 U.S. 334, 350–351; *Milk Producers Association* v. *United States*, 362 U.S. 458, 462–463.

[18] In fact, Congress has directed procurement officials receiving bids which evidence a possible antitrust violation to "refer such bids to the Attorney General for appropriate action." 41 U.S.C. 252(d).

[19] The dissolution of the Association on December 28, 1967, does not obviate the need for such relief. In its complaint the government sought to enjoin each of the Association's members from engaging in concerted bidding on any future government procurement (App. 8–9). The members of the Association, which were individually named as defendants, could easily form another association and resume concerted Webb-Pomerene bidding on all procurements not limited to U.S. sources (assum-

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ing the present regulation remains in force, see *supra*, p. 27, n. 16) whenever they deem it profitable to do so. The case is therefore not moot, and injunctive relief is appropriate. See *United States* v. *Trans-Missouri Freight Association*, 166 U.S. 290, 309; *Walling* v. *Helmerich & Payne, Inc.*, 323 U.S. 37, 43; *Walling* v. *Reuter Co.*, 321 U.S. 671, 673–674; *Federal Trade Commission* v. *Goodyear Co.*, 304 U.S. 257, 260; *Gray* v. *Sanders*, 372 U.S. 368, 375–376.

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